FOR ARGUMENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *et al.*,
*Petitioners,*

v.

CHARLES GOODMAN, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| ARGUMENT | 1 |
| 1. Respondents' brief mischaracterizes the nature of the issues in this case | 1 |
| a. The courts below did not find that the unions treated the non-discrimination provisions of the contract differently from all the other provisions of the contract | 4 |
| b. The courts below did not find that the unions were placing special burdens on blacks, giving blacks interior treatment, denying blacks equal access to, and protection of, the grievance process, or engaging in any other form of discriminatory treatment of blacks | 12 |
| 2. Respondents' brief misapprehends the applicable legal standards | 16 |
| CONCLUSION | 20 |

## TABLE OF AUTHORITIES

*Cases* Page

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) ..... 17
*Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) ..... 17
*Com. of Pa. v. Local Union 542, Intern. Union*, 807 F.2d 330 (3rd Cir. 1986) ..... 16
*Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304 (E.D. Pa. 1978) ..... 14
*Hunter v. Erickson*, 393 U.S. 385 (1969) ..... 18-19
*Vaca v. Sipes*, 386 U.S. 171 (1967) ..... 18
*Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) ..... 18-19

*Statutes and Regulations*

Civil Rights Act of 1866, 42 U.S.C. § 1981 ..... *passim*
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e ..... *passim*
§ 703(c)(1) ..... 19
§ 703(c)(2) ..... 19
§ 703(c)(3) ..... 19, 20

## REPLY BRIEF FOR PETITIONERS

### ARGUMENT

Respondents' brief (1) mischaracterizes the nature of the issues in this case, and (2) misapprehends the applicable legal standards.

1. *Respondents' brief mischaracterizes the nature of the issues in this case.* Respondents' ("plaintiffs' ") brief asserts that this case is *not* about whether a union has an affirmative duty to combat employer discrimination. Rather, plaintiffs contend that the unions "treat[ed] the non-discrimination provisions of [the] collective bargaining agreement differently from other provisions" of the agreement (Resp. Br. at i), that in so doing the unions "classified grievances according to race" (*id.* at 17), and that, as a result, the unions imposed "substantial and unique burdens on racial minorities" (*id.* at 18), giving those minorities "inferior treatment because their grievances raise racial issues" (*id.* at 30 n.33).

Not one of the propositions in this litany is supported by the findings below or the evidence. The courts below found the unions liable not on the ground that the unions had themselves discriminated—as that term is ordinarily understood—but on the following basis: Title VII and 42 U.S.C. § 1981 impose on unions an affirmative duty to combat employer discrimination, and the reluctance of the unions here to base grievances on the non-discrimination clause of the contract was a failure to satisfy that duty—an intentional failure, given that the unions were aware of the employer discrimination. To be sure, the courts below called this failure "discrimination," but that label was predicated on the notion that the term "discrimination" encompasses the knowing failure of a union to combat employer discrimination. See *infra* at 14-16; see also U. Br. at 18-20, 26 n.26.

Plaintiffs are disingenuous in claiming otherwise. In their brief in the court of appeals, plaintiffs acknowledged that, given the findings of the district court, the unions'

liability in this case turns on whether either Title VII or § 1981 imposes an affirmative duty on unions to combat employer discrimination. Thus, plaintiffs' statement to the court below of the issues presented was, in pertinent part, as follows:

> 1. Did the district court commit reversible error in holding that a union may be held to violate 42 U.S.C. § 1981 and Title VII of the 1964 Civil Rights Act for intentionally failing to combat employer discrimination?
>
> 2. If the theory of liability referred to in paragraph 1 above is valid, did the district court commit reversible error in its finding that the Unions violated Section 1981 and Title VII by intentionally failing to combat employer discrimination? [1]

And in the body of their brief in the court below, having argued that "a union's failure to combat an employer's acts of race discrimination can render it liable under Title VII and Section 1981," [2] plaintiffs contended that "The District Court Properly Found That The Unions Violated Their Obligation To Combat Employer Discrimination" (*id* at 114). In this context, plaintiffs described the elements of the theory of union liability applied by the district court in this case:

> In determining whether a union is liable to a class under Title VII and Section 1981 for not combatting

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[1] Brief for Appellees, *Goodman, et al. v. Lukens Steel Co. & United Steelworkers*, Nos. 84-1478 and 84-1509 (3rd Cir.), filed February 6, 1985 (hereinafter referred to as "Plaintiffs' Court of Appeals Brief"), at pp. (xvi)-(xvii). For the convenience of the Court, ten copies of that brief have been lodged with the Clerk of this Court.

[2] *Id.* at 114. Plaintiffs argued for this legal duty in the terms summarized by the brief's argument headings: "Section 1981 Is Violated When A Union Intentionally Chooses Not To Combat Employer Discrimination" (*id.* at 100); "The Language Of Title VII Supports Imposition Of Liability Against A Union for Its Failure To Combat Employer Race Discrimination" (*id.* at 104); "Macklin v. Spector Freight Systems, Inc. And Its Progeny Are Soundly Reasoned And Correctly Decided" (*id.* at 108).

> an employer's acts of race discrimination, the trial court should examine (a) whether the employer has in fact engaged in race discrimination; (b) whether the union knew or should have known of the employer's discriminatory conduct; (c) whether the union failed to combat the discrimination; and (d) whether the union failure was . . . on a class-wide basis. For purposes of determining liability under Section 1981, inquiry into whether the union's failure was intentional is also relevant.
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> * * *
>
> In every area as to which the trial court found the Unions liable, analysis of each of the relevant factors fully supports the imposition of liability. [*Id.* at 114-15.]

The findings of the trial court—the findings which frame the issue in this Court—have not changed since plaintiffs drafted the passages quoted above. Yet *now* plaintiffs contend that this case does not present the question whether unions have an affirmative duty under Title VII and § 1981 to combat employer discrimination. Now plaintiffs contend that the district court and the court of appeals "simply h[e]ld that unions may not systematically treat complaints of employer racial discrimination differently from other complaints by their members" (Resp. Br. at 15).

Plaintiffs' revisionist characterization of the holdings below cannot withstand analysis. Not surprisingly, in light of the way plaintiffs pleaded and proved their case, neither the evidence, the district court's findings of fact, nor the legal analysis of the courts below supports this characterization.[3]

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[3] Plaintiffs' complaint alleged that the unions had "passively permit[ted] the employer to discriminate against black persons" and had "[f]ailed to act affirmatively to cause the employer to refrain from discriminating against black employees because of race and color" (I JA 7). The complaint also alleged that the unions had discriminated against blacks in processing grievances (*id.*). The district court found that plaintiffs had failed to prove the latter claim. Pet. App. 135a-137a. This finding is the only finding made

**a. The courts below did not find that the unions treated the non-discrimination provisions of the contract differently from all the other provisions of the contract.**

The linchpin of plaintiffs' new-found characterization of this case is the assertion that the unions treated the non-discrimination provisions of the contract differently from all other provisions of the contract. Plaintiffs' sole proffered support for this assertion is that "[t]here is no evidence that the Unions similarly avoided enforcing any other provision of the collective bargaining agreement" (Resp. Br. at 14); see also *id.* at 18 ("The Unions adduced no evidence that they were reluctant to assert any kind of grievance claim other than racial discrimination; indeed, the 8,000 grievances they filed belie any such claim").

If plaintiffs had sought to make a claim of discrimination in the unions' handling of racial discrimination grievances as opposed to other types of grievances, it would have been plaintiffs' burden to produce evidence of such discrimination. Plaintiffs did not even attempt to carry that burden. And, in the record made, plaintiffs are simply wrong in asserting that there is no evidence that the unions were reluctant to assert grievances under other provisions of the contract. To the contrary, the district court made the following findings on this point:

> Upwards of 8,000 grievances have been filed at Lukens during the limitations period. The steady increase in grievance filings each year has not produced a corresponding increase in the capacity of the grievance-processing system to handle complaints. As a result, the grievance procedures at Lukens are characterized by the following:
>
> a. Serious grievances (*i.e.*, those involving more than a four-day suspension, and those involving discharges) are given priority. And, because each "zone" within the plant handles its grievances sepa-

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by the court with respect to whether the unions themselves had discriminated in the grievance process.

> rately at the early stages, and fourth-step hearings are held only once or twice each month, an attempt is made to allocate the hearing-time among the zones.
>
> * * *
>
> c. In an effort to alleviate the backlog, there has been an increasing tendency on the part of the unions to dispose of less-serious grievances by simply withdrawing them "without prejudice" . . . .
>
> In short, the manner in which the unions handle employee grievances at Lukens does not fully comport with the terms of the collective bargaining agreement, and is subject to legitimate criticism. There is, however, no hard evidence to support an inference that these inadequacies disadvantage blacks to a greater extent than whites. [Pet. App. 135a.][4]

In addition, the district court identified a whole category of claims, available to white and black employees alike, that the unions *never* processed: "the unions have pursued a uniform policy of not filing grievances on behalf of probationary employees *for any reason*" (*id.* at 137a, emphasis added).[5]

The district court, in sum, simply did not find that the unions had singled out the non-discrimination clause for non-enforcement. All that the district court found in this connection is the following: "It is *undisputed* that the unions were *reluctant* to assert racial discrimination as a *basis* for a grievance. . . ." (Pet. App. 138a, emphasis

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[4] See also, U. Br. at 7 n.5.

[5] Under the contract, grievances for probationary employees could be asserted on a wide range of issues having nothing to do with race: for example, wages, overtime, shift differentials and a multitude of other issues involving terms and conditions of employment. Apart from those broad categories of potential grievances, a probationary employee also had a limited contract right to challenge his discharge: before 1974, a probationary employee could challenge a discharge as based on discrimination because of membership in the union; since 1974, a probationary employee could challenge a discharge on grounds of discrimination based on union membership, race, color, creed, national origin, or sex. See U. Br. at 13-15.

added.) What the court meant by this finding is elucidated by consideration of the "undisputed" evidence on which the finding is grounded.

The "undisputed" evidence (indeed the only evidence) supporting this finding is the testimony of a number of union officials—both white and black—as to their approach to handling grievances where an employee claimed to have been the victim of racial discrimination. This testimony established that where a grievance could be based on a provision of the contract other than the nondiscrimination clause, union representatives frequently determined, as a matter of tactics, that they could most effectively represent a grievant by basing the grievance solely on that other clause. The district court understood that such tactical considerations were the source of the unions' "reluctan[ce]":

> In order to establish that a particular grievance had merit, it was necessary to establish a violation of the collective bargaining agreement. If such violation could be established, it was unnecessary to go further, and establish racial animus. And the company tended to "get its back up" and resist any charge of racial discrimination; or at least that was the union's perception of the company's position. [Pet. App. 138a.] [6]

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[6] Plaintiffs' brief suggests that the district court found this explanation to be "pretextual" (Resp. Br. at 13). But the court did *not* so find. Indeed, the court expressly found that it was "the unions' perception" that "the company tended to 'get its back up' and resist any charge of racial discrimination . . . ." Rather than finding the explanation pretextual, the court found the explanation to be "unacceptable" in that it did not fully meet the court's conception of what was necessary to eradicate the employer's discrimination. Moreover, the suggestion that this explanation could have been found pretextual is belied by the fact that it was stated by witnesses, black and white, called by the plaintiffs as well as by the unions, and was not controverted. See, *e.g.*, I JA 157-58, 187, 189-89, 239-40, 247-48, 301-02.

The court did not find or suggest that the unions' "reluctan[ce]" was in any way motivated by race or that it caused blacks to receive "inferior treatment" from the unions (Resp. Br. at 30 n.33). Indeed, the tactical considerations motivating the "reluctan[ce]" concerned *how best to achieve relief for the grievants.*

Most provisions of the contract that establish employee rights set forth an objective standard by which to measure whether the rights have been violated. In many instances, the objective standard necessarily incorporates protection against discrimination. For example, at Lukens almost all situations involving competition between employees—promotions, demotions, transfers, lay-off, recall, overtime, and so on—are governed by employee seniority. A witness who had been involved in negotiation of union agreements going back to the early 1940's testified: "The purpose of the seniority is to avoid discrimination" (I JA 261). "Absent seniority," each of these competitive situations involves the "potential of all kinds of discrimination based on friendship, relationship, religion, sex, race, ethnic background and so forth" (*id.*). When, as here, promotions are governed by seniority, a black employee denied a promotion need not prove he was the victim of discrimination to obtain a remedy through the grievance process, he need only show that he was the senior competitor for that position. "When you violate a person's seniority [for any] reason you violate it" (*id.* at 269). By the same token, if that employee were not the senior competitor, his grievance would not be successful, and an allegation of racial discrimination could not alter that result.

The same point is applicable, for example, to employee grievances concerning wage rates, incentives, shift differentials, leave time, discipline and discharge. As a shop steward called by plaintiffs acknowledged, "if you have a fairly clear case of a contract violation . . . it doesn't add anything to add racial discrimination as well" (I JA 302).

An allegation of racial discrimination is not merely superfluous in such situations; such an allegation may well frustrate obtaining prompt relief for the individual grievant. As one of the named plaintiffs, who served as a union shop steward, testified, "discrimination is a hard thing to prove" (Tr. 12.180-.181; see also I JA 158, 187-189; Tr. 14.55-.56). Thus, to seek to prove discrimination where proof of violation of the grievant's seniority rights would be sufficient to prevail would unduly complicate and delay resolution of the grievance. See U. Br. at 9-10. Moreover, the undisputed evidence here showed that the employer was less willing to settle grievances alleging discrimination. *Id.* Another witness, a class member, testifying for plaintiffs, summed up what the evidence showed to be the common experience:

> [D]uring the years that I was a shop steward[,] I found that I was able to work better by not saying discrimination, but just by proving that they were wrong and getting some records to verify this. [I JA 158.] [7]

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[7] As already stated, the evidence described in text as to the reasons for the unions' "reluctan[ce]" was undisputed, and was given by witnesses for plaintiffs as well as witnesses for the unions. The district court found the unions' motivation to be the tactical considerations just outlined. Pet. App. 138a. Nevertheless, plaintiffs in their brief lift out of context a hypothetical "worst-case" situation postulated by the district court in reasoning to its legal conclusion, and treat that hypothetical as if it were a finding of fact in this case. The district court reasoned: "A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title VII and § 1981. . . ." (Pet. App. 139a-140a).

The district court said "[a] union," not "these unions," and the evidence here would not have supported the latter. There is no evidence in the record that the unions in this case were motivated by either of the considerations postulated by the Court. The latter of the two hypothetical situations is particularly inconsistent with the facts of this case, given the regular election of blacks to high union offices and their regular selection as repre-

An example cited in plaintiffs' brief in this Court illustrates the points just made. Plaintiffs assert that "[a] particularly striking example [of the unions' failure to assert racial discrimination] is the case of class member Alfred Hicks" (Resp. Br. 12). Hicks was discharged by Lukens allegedly for striking a foreman and for insubordination in connection with that incident. The unions' defense was that Hicks had not committed the offense. At the arbitration hearing, the unions presented five eyewitnesses to support the contention that Hicks had not struck the foreman or been insubordinate. (II JA 467, 473-476). The company presented witnesses who testified to the contrary. If the unions' witnesses were believed, Hicks would prevail. If the unions' witnesses were not believed, Hicks would be found to have struck the foreman and been insubordinate. In either event, the eyewitness testimony would likely control the outcome, and a claim that the discharge was motivated by race discrimination could not likely alter that result. In the Hicks case, the inexperienced assistant grievanceman, a white who testified as a witness for plaintiffs, had wanted to assert race discrimination in the grievance, but he was overruled by a black union official, who was the chairman of the unions' grievance committee—the local's top grievance-processing official (I JA 207, 299-300). The assistant grievanceman acknowledged that "[t]his was just an honest disagreement [of] opinion as to what were the best tactics to use" (I JA 300). Based on the testimony of the eyewitnesses, the arbitrator found that there had not been a fight as such, but that Hicks had been insubordinate,

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sentatives in negotiations as well as in the grievance procedure (see U. Br. at 7), and given the accomplishment by the unions of significant improvements for blacks. See, *e.g.*, U. Br. at 10, 16-17.

The court of appeals termed the passage in question in the district court's opinion a "comment[]" (Pet. App. 25a). Whatever it is, it is not a finding of fact in this case. In short, while we do not disagree that a union that "avoids asserting discrimination claims . . . in deference to the perceived desires of its white membership" could well violate Title VII and § 1981, that is not this case.

and ordered Hicks reinstated without back pay (II JA 477-479).[8]

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[8] Another example cited in plaintiffs' brief (Resp. Br. at 11)—the union's strategy regarding the employer's tests—also illustrates the point. See U. Br. at 12-13.

Plaintiffs' witnesses testified to about a dozen occasions in the period from 1967 to 1980 in which a black employee complained of perceived race discrimination and the union representative failed to include a claim of race discrimination in a grievance. See, e.g., I JA 146-147, 299-301; II JA 392-393, 455-501; Tr. 5.190-.191. The record contains about twice as many occasions over the same period when a grievance filed by the unions contained an allegation of racial discrimination. See U. Br. at 8 n.8. Plaintiffs quibble with some of the examples included by the unions in the latter category because even though the grievant was black and the grievance alleged "discrimination" the unions failed to use the term "racial discrimination" (Resp. Br. at 10 n.12). Plaintiffs also would discount race discrimination grievances filed after 1974 (*id.*). Since the period from 1975-1980 constitutes approximately half the total period for which the unions have been found liable, one wonders how plaintiffs can question the relevance of evidence of union conduct from 1975-1980. Plaintiffs cannot cling to the finding of union liability for that period and at the same time assert that what the unions did during that period should not be considered.

In this regard, it should be understood that the number of grievances alleging racial discrimination identified in the record of this case hardly constitutes the universe of such grievances. Because, as the district court found, "the unions' records on grievances are filed by grievance number," and not by subject matter, no party was able to put together a complete compilation of the number of grievances alleging racial discrimination (Pet. App. 136a-137a). Moreover, the record contains examples of grievances that obviously invoked the non-discrimination clause but that did not use the word "discrimination"—*e.g.*, a grievance complaining that a black employee was called "boy" by his foreman (Tr. 12.196-.197). There is no way of knowing how many such grievances were filed.

Plaintiffs suggest that it is somehow significant in this connection that over the period 1967 to 1980 the unions filed over 8,000 grievances that presumably did not allege racial discrimination. But even plaintiffs would concede that every day at this plant employees, black and white, had many complaints against their employer that had nothing to do with race discrimination. See U. Br. at 7-8 and notes 6 & 7.

Plaintiffs' assertions that the unions were classifying grievances according to race or taking race into account in processing grievances are thus not borne out by the findings or the evidence in this case. The unions did what lawyers do in assessing which claims to assert on behalf of a client. A lawyer who decides as a matter of tactics to allege a simple contract violation and not to allege a violation of one of the civil rights laws is not engaging in racial discrimination. The same is true when a union representative makes a comparable litigation judgment. Alleging race discrimination is not the same as protecting employees from race discrimination, nor is it necessarily the best way to accomplish that objective. Title VII and § 1981 protect people, not contract clauses.[9]

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[9] Plaintiffs begin their brief in this Court with a recitation of racist incidents at Lukens and of certain discriminatory practices of the employer that occurred before the statute of limitations in this case. Resp. Br. 5-9. Regrettably, there is no question that racism existed at Lukens and that over the years the employer engaged in a number of discriminatory practices. However, it should be noted that in these pages of their brief, plaintiffs do not cite *a single act of discrimination committed by the unions.* (Plaintiffs, at Resp. Br. 6, refer to a racist remark allegedly made to a paralegal working for plaintiffs' lawyers, which the paralegal attributed to "[a] union official referred to as Maldy" (I JA 50); the trial court made no finding on this point, perhaps because the record did not show who "Maldy" was and whether he was in fact a union official.)

The undisputed evidence shows that from the time the unions organized Lukens in the late 1930's, blacks have been active participants in the unions and have been involved in leadership positions. See Pet. App. 71a; U. Br. 7. Indeed, black organizers were instrumental in the initial organization of the unions (I JA 159, 285; Tr. 260-61). From the beginning, in a town where meetings were generally open only to members of one race, union meetings were always integrated (Tr. 22, 56-57, 25.11); indeed, in the beginning, the unions were the only organization in town to which blacks and whites both belonged (Tr. 22.55-56, 22.77).

Without going into more detail, the point here is simply that unlike other institutions of the time, the unions' history was not one of racism. And, the district court rejected both of plaintiffs' claims that the unions had themselves engaged in discrimination: the court found that the unions had not negotiated the seniority system for

**b. The courts below did not find that the unions were placing special burdens on blacks, giving blacks inferior treatment, denying blacks equal access to, and protection of, the grievance process, or engaging in any other form of discriminatory treatment of blacks.**

The district court's problem with the unions' "reluctan[ce]" to assert the non-discrimination clause as a basis for grievances was not that this "reluctan[ce]" constituted—or was motivated by—racial discrimination by the unions, or that by their "reluctan[ce]" the unions were placing special burdens on blacks, giving blacks inferior treatment, or denying blacks "equal access to, and protection of, . . . the grievance system" (Resp. Br. at 30). The court made no such findings. To the contrary, the court concluded that the grievance process worked equally well for blacks as for whites (Pet. App. 135a-137a). Indeed, the court's opinion makes clear that the unions through grievances based on provisions other than the non-discrimination clause were successful in combatting employer discrimination in a number of areas—*e.g.*, discharges of nonprobationary employees, work assignments, shift differentials and overtime (Pet. App. 93a, 101a).

Instead, the district court's problem with the unions' "reluctan[ce]" was that the court believed that had the unions adopted a different strategy—that of regularly basing grievances on the non-discrimination clause—the unions might have mitigated more generally the employer's propensity to discriminate: in the court's words, "it seems obvious that vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes" (Pet. App. 138a).[10] Thus, the crux of the district court's

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discriminatory purposes, and had not discriminated in the processing of grievances. Pet. App. 70a-71a; 135a-137a.

[10] The court also stated that the unions' approach was "unacceptable" because it failed to deal adequately with instances of racial harassment that "involve no loss of pay or permanent disciplinary record" (Pet. App. 138a). We showed in our opening brief that because the court of appeals vacated the district court's underlying

determination was that the unions failed to give "vigorous pursuit [to] claims of racial discrimination"; and the harm that resulted from that failure was that attention was not "focused . . . upon racial issues" and as a result "attitudes" were not changed. This conclusion—not discrimination by the unions—is the basis for the finding of union liability in this case.

Plaintiffs emphasize that the district court found "more than mere passivity on the part of the unions" (Resp. Br. at 3). But the "more" that the court found was union knowledge of employer discrimination and the "re-

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finding that racial harassment at Lukens was a class-wide problem, the unions' liability for not combatting such discrimination is not before this Court (U. Br. 10-11 n.11). Plaintiffs contend that, because "Union officials *admitted* that they had a practice of treating grievances alleging racial discrimination differently from other grievances," the court of appeals did not vacate the finding of union liability with respect to combatting racial harassment (Resp. Br. 4 n.6). The court of appeals made no such ruling.

Moreover, each of the following considerations belies plaintiffs' contention in this regard. First, as already discussed, *supra* at 4-11, union officials did *not* admit any such differential treatment. Second, no union official "admitted" to any reluctance to assert race discrimination where there is no other satisfactory basis for a grievance, which would be the situation in the category of racial harassment grievances now under discussion. Third, because of the action taken by the court of appeals in vacating the racial harassment claim, that court had no occasion to consider, *inter alia*, the following arguments made by the unions: (i) During the period 1967 to 1980, the evidence shows only 13 instances of alleged racial harassment that were brought to the attention of the unions; in 10 of those instances, the unions took action, including the filing of grievances, in the victim's behalf (U. Br. 11, n.11). (ii) The unions had negotiated an alternative mechanism to the grievance process that was particularly well suited to handling racial issues involving no loss of pay or disciplinary record: the joint labor-management civil rights committee. See, *e.g.*, I JA 247; II JA 592-603, 706-709. Indeed, a class member, who was called as a witness by plaintiffs, testified that in his position as a union shop steward he had been instructed by other union officials that if he has "a complaint of race discrimination which [he] can't handle in the shop, that the appropriate course of action is to refer it to the Civil Rights Committee" (I JA 64).

luctan[ce]" notwithstanding that knowledge to assert racial discrimination as a basis for grievances. If the unions had no affirmative duty to assert racial discrimination as such in grievances, then a knowing determination not to do so was not violative of the law. The "more" that the court found does not change the issue. The issue remains whether the unions had that affirmative duty.

Plaintiffs point to the fact that in setting forth its "Conclusions," the district court used the label "discriminat[ion]" to apply to the unions' "failure" to combat employer discrimination—specifically, to the unions' failure to make extensive use of the non-discrimination clause in the processing of grievances. Pet. App. 147a. But in light of the court's findings of fact, and of the undisputed evidence, that label can only mean that the court used the term "discrimination" to encompass a union's knowing failure to challenge employer discrimination. The label that a court puts on its findings does not alter the essential character of those findings.

Indeed, in their brief to the court of appeals, plaintiffs manifested their understanding that the district court had used the term "discrimination" to refer to the unions' failure to combat employer discrimination. And plaintiffs urged that the court of appeals adopt the same definition of discrimination. Thus, relying on *Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1353 (E.D. Pa. 1978), plaintiffs argued to the court of appeals that:

> "a union's acquiescence in discriminatory company conduct" is actionable under Section 1981 because a "union's failure to negotiate for non-discriminatory contract terms or to protest discriminatory treatment *is in itself discrimination.*" 472 F. Supp. at 1353. The Unions can point to not a single District Court or Court of Appeals case that rejects this theory. [Plaintiffs' Court of Appeals Brief at 101 (emphasis added); see also Resp. Br. 36 n.36.]

Plaintiffs' brief below argued that this concept of "discrimination" also justified a conclusion, which the district

court had not stated, that the unions' failure to combat employer discrimination was a violation of § 703(c)(1) of Title VII:

> The Unions' conduct in this case was violative of *both* Sections 703(c)(3) and 703(c)(1). Their refusal to process race discrimination grievances, in the face of clear employer discrimination, was not only a "cause" of employer discrimination, but in itself independently constituted discriminatory behavior.
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> * * *
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> [H]owever one interprets Section 703(c)(3), Section 703(c)(1) must be interpreted as imposing liability on unions for any kind of discrimination—both active and passive—on the basis of race. [Plaintiffs' Court of Appeals Brief at 105, 108 (emphasis in original).]

The court of appeals picked up on the definition of discrimination urged by plaintiffs, stating that "[t]he deliberate choice not to [assert race discrimination in] grievances also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation," and that "[t]he district court's finding of intentional discrimination properly supports the claims under § 1981 as well" (Pet. App. 26a-27a). See U. Br. at 26, n.22. The court of appeals did not purport to alter or overturn any finding of fact of the district court. The court of appeals did not conclude—and the district court's findings would not have allowed the conclusion—that the unions classified grievances according to race, put special burdens on blacks in the grievance process, gave inferior treatment to black grievances, or any of the variations on those themes repeated throughout plaintiffs' brief in this Court.

Plaintiffs now claim that the court of appeals' words quoted above mean something more than, or different from, the meaning plaintiffs urged upon the court of appeals. But, once again, whatever label is put on it, the union conduct at issue here is a failure to take cer-

tain affirmative steps to combat employer discrimination —specifically the unions' "reluctan[ce]" to assert race discrimination as a basis for grievances. See U. Br. at 18-19, 20. Either the unions had an affirmative duty under Title VII and § 1981 to take such steps, or they did not. Calling the unions' failure to fulfill that duty "discrimination" does not change the issue.

In a subsequent decision, the Third Circuit has left no doubt as to the purport of its holding in the instant case. Thus, in *Com. of Pa. v. Local Union 542, Intern. Union*, 807 F.2d 330, 338 (3rd Cir. 1986), the court of appeals ascribed to its decision in the instant case the very meaning that plaintiffs now seek to disclaim—*i.e.*, that if a union obtains information that an employer is discriminating,

> it will owe an affirmative duty to its minority members to take action against the offending employer or employers to enforce the non-discrimination provisions of its collective bargaining agreements. *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985).

2. *Respondents brief misapprehends the applicable legal standards.* As we have shown, this case is about whether the unions had an affirmative duty to combat employer discrimination, and if so whether the unions failed to satisfy that duty. Accordingly, virtually all of the legal arguments offered in plaintiffs' brief are beside the point. Plaintiffs make only scant efforts to support the theory of union liability adopted by the courts below.[11] Nevertheless, we address certain arguments made by plaintiffs because discussion of these arguments helps focus the proper analysis in this case.

Plaintiffs assert that it would violate Title VII and § 1981 for a union, once having negotiated a contract

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[11] Plaintiffs address that issue only in the second paragraph of footnote 24 and in footnote 26 of their brief. The points made in our opening brief include complete responses to the contentions in these footnotes.

with a non-discrimination provision, to determine to give enforcement of that provision a lower priority than other provisions in the agreement. Obviously, we agree that a union could not make such a determination for racially discriminatory reasons, just as a union may not base any decision respecting its members on racially discriminatory reasons. But—although it is not this case [12]—we do not agree that a union is not permitted to determine, for legitimate reasons apart from race, that enforcement of a non-discrimination provision should be given a lower priority than enforcement of other provisions.

There are legitimate reasons for such a choice. Under the national labor laws, a union is not required to process every grievance that may be meritorious. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). In the area of enforcing contracts, as in other aspects of a union's representative function, a union is free to make judgments and to set priorities based on what it deems to be in the collective interests of its members. *Id.* at 742. Discrimination grievances are singularly difficult to prove. The mass of statistical and anecdotal evidence the plaintiffs produced in this case is not different from what a union would have to produce if it tried to prove similar claims in the arbitration process—and the union would have to do so without any right of discovery. See *Alexander v. Gardner-Denver*, 415 U.S. 36, 57-59 (1974). A union is entitled to decide that such grievances are too great a drain on its resources in light of other pressing needs of its members, particularly given that—unlike most other employee concerns—the victims of discrimination have an alternative means, through the civil rights laws, to secure full relief. That unions are to

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[12] Here the undisputed evidence and the findings of the district court establish not that the unions gave a lower priority to fighting employer discrimination, but that the unions often made the tactical choice—in the interests of achieving full and expeditious relief for individual black grievants—to attack such discrimination through a grievance based on a provision other than the non-discrimination clause. See *supra* at 4-11.

determine their own priorities in such matters is at the heart of our system of labor relations. See U. Br. at 34-45.[13]

The cases on which plaintiffs rely, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), are not to the contrary. In those cases, this Court found that the governmental entities involved had established a skewed decision-making process which made it harder to adopt certain laws benefiting minorities than to adopt other laws. In *Hunter* the Court found that "[o]nly laws to end housing discrimination based on 'race, color, national origin or ancestry' must run [the procedural] gantlet" established by the provision at issue. 393 U.S. at 390. The Court concluded that,

> the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. [393 U.S. at 393.]

And, in *Seattle School Dist.*, the Court found that the initiative in question "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." 458 U.S. at 470; see also, *id.* at 474, 480 n.23.

Thus, both of these cases dealt with a racial skew in the structure of decision-making, not with the priorities ultimately chosen by government through an unskewed decision-making structure. Neither case compels governmental entities to give equal priority to racially identifiable interests in enacting laws or in enforcing existing

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[13] The duty of fair representation, which plaintiffs' brief discusses at 33 n.38, does not require that a union make particular judgments or set particular priorities. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). See U. Br. at 39.

laws. Indeed, both cases made clear that if the governmental entities in question determined, through a process that is not racially biased, to repeal or decline to enact legislation remedying disadvantages suffered by minorities, such determinations would not be improper. 458 U.S. at 483 ("the simple repeal or modification of desegregation or antidiscrimination laws without more, never has been viewed as embodying a presumptively invalid racial classification"); 393 U.S. 390 n.5; see also 393 U.S. at 394-95 (Harlan, J., concurring).

By the same reasoning, a union that does not have a racially biased decision-making process is under no compulsion to give equal priority to racially identifiable interests in setting its priorities in the grievance or negotiation process.[14] Union decisions as to how best to allocate their enforcement resources, or how best to process particular grievances, are akin to the kinds of decisions made regularly by governmental prosecutorial or civil law enforcement agencies. Decisions of this type that are not made for improper reasons are not improper on a theory that there is an alternative approach that would give a higher priority to concerns unique to minorities.

Plaintiffs are simply wrong when they suggests that Title VII requires unions to place combatting employer discrimination as "a matter of highest priority" (Resp. Br. at 29). Title VII clearly makes it a matter of "highest priority" that unions not *engage* in discrimination. § 703(c)(1) and (2). But, as to a union's responsibility respecting employer discrimination, Title VII requires only that a union not "cause or attempt to cause an employer to discriminate." § 703(c)(3); see U. Br. at 25-34. That provision is far from requiring unions to

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[14] An analogy to *Hunter* and *Seattle School Dist.* in the union context would be a union constitution or by-law providing that ratification of a contract term having particular benefit for minorities must be accomplished by a vote of a greater proportion of members than would be required for ratification of other kinds of contract provisions.

place the highest, or even a high, priority on combatting employer discrimination.[15]

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening brief, the findings of liability against the unions in this case should be reversed.

Respectfully submitted,

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[15] Plaintiffs, in a footnote near the end of their brief, suggest that the decisions below may be justified on a disparate impact theory because the unions' "reluctan[ce]" to combat the employer's discrimination served to "perpetuate" that discrimination. Resp. Br. at 23-24, n.25. Plaintiffs did not raise or argue such a theory below. Neither court purported to base the unions' liability on such a ground. In any event, such an argument would read § 703(c)(3) out of the statute. In the sense that plaintiffs use the term, any union decision to put other priorities ahead of combatting employer discrimination would have the effect of "perpetuating" the employer's discrimination. Thus, if plaintiffs' argument were correct, a union would be liable under Title VII for any race-neutral decision that draws resources away from fighting an employer's discrimination. The Congress that addressed union liability for employer conduct with the language "cause or attempt to cause" plainly did not intend such a result.